

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PABLO FERNANDEZ,

*Petitioner,*

v.

MICHAEL CAPRA,

*Respondent.*

00 Civ. 7601 (KMW) (GWG)

**DECLARATION OF GABRIELLE E. TENZER IN SUPPORT OF PETITIONER  
PABLO FERNANDEZ'S THIRD AMENDED PETITION FOR  
WRIT OF HABEAS CORPUS**

GABRIELLE E. TENZER declares pursuant to 28 U.S.C. § 1746:

1. I am associated with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019-6064, counsel for petitioner Pablo Fernandez ("Mr. Fernandez" or "Petitioner"). I submit this declaration in support of Petitioner's Third Amended Petition for Writ of *Habeas Corpus*.

2. To the best of my knowledge,<sup>1</sup> attached to this declaration are true and correct copies of the following documents:

Exhibit 1: Arrest warrant dated June 7, 1995, in *People v. Fernandez*, Ind. No. 5415-95.

Exhibit 2: Indictment #05415-95, *People v. Fernandez*.

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<sup>1</sup> Other than those documents obtained from publicly-available electronic databases, the documents attached to this declaration were obtained from either: (1) a state court; (2) Mr. Fernandez's C.P.L. § 440.10 motion counsel, Mr. David Samel, Esq., who represented that the C.P.L. § 440.10 motion documents are true and correct copies from his files and that the copies of the C.P.L. § 330.30 motion documents were obtained from Mr. Fernandez's family; or (3) the Jerome N. Frank Legal Services Organization of the Yale Law School, which represented Mr. Fernandez in his appeal to the Second Circuit.

- Exhibit 3: Motion in *People v. Fernandez* (1) to inspect the grand jury minutes, (2) to dismiss the indictment, (3) for a *Huntley* hearing, (4) for a *Wade* hearing, (5) for a *Sandoval* hearing, (6) for an extension of time to file any other necessary motions, and (7) for a bill of particulars and discovery and inspection, dated July 28, 1995.
- Exhibit 4: Transcript of the *Wade* hearing on January 10, 1996, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 5: Excerpts from the trial transcript in *People v. Fernandez*, Ind. No. 5415-95.<sup>2</sup>
- Exhibit 6: Letter from Assistant District Attorney Deborah Hickey to Hermione Perlmutter, Esq., dated February 15, 1996, informing Ms. Perlmutter of the arrest of Albert Melino.
- Exhibit 7: Petitioner's Motion to Set Aside the Verdict Pursuant to C.P.L. § 330.30,<sup>3</sup> dated March 5, 1996, and accompanying exhibits.
- Exhibit 8: Transcript from hearing held in the Supreme Court of the State of New York, New York County, on April 18, 1996, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 9: Transcript from hearing held in the Supreme Court of the State of New York, New York County, on April 30, 1996, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 10: Order of the Supreme Court of the State of New York, New York County, dated June 17, 1996, denying Petitioner's Motion to Set Aside the Verdict Pursuant to C.P.L. § 330.30.
- Exhibit 11: Petitioner's Notice of Appeal to the Supreme Court of the State of New York, Appellate Division, First Department, dated June 24, 1996.
- Exhibit 12: Petitioner's Memorandum of Law in Support of His Appeal to the Supreme Court of the State of New York, Appellate Division, First Department, dated October 29, 1996.

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<sup>2</sup> The trial transcript that we were able to obtain is missing certain pages, including pages 99-100, 437, 1424, and 1450.

<sup>3</sup> While Petitioner's Motion to Set Aside the Verdict is captioned as one brought pursuant to C.P.L. § 440.40, it was in fact brought pursuant to C.P.L. § 330.30.

- Exhibit 13: Decision of the Supreme Court of the State of New York, New York County, granting motion of Albert Melino to dismiss the indictment in *People v. Melino*, dated February 11, 1997.
- Exhibit 14: Opinion of the Supreme Court of the State of New York, Appellate Division, First Department, dated April 2, 1998, affirming Petitioner's conviction.
- Exhibit 15: Letter from David H. Weiss, Esq. to Hon. Judith S. Kaye, dated April 8, 1998, requesting permission to appeal to the New York Court of Appeals.
- Exhibit 16: Letter from Petitioner to Hon. Judith S. Kaye, dated April 15, 1998, supplementing his request for permission to appeal to the New York Court of Appeals.
- Exhibit 17: Decision of Hon. Judith S. Kaye, dated August 18, 1998, denying Petitioner's request for permission to appeal to the New York Court of Appeals.
- Exhibit 18: Petitioner's Motion to Vacate the Judgment of Conviction Pursuant to C.P.L. § 440.10, dated April 23, 2003, and accompanying exhibits.
- Exhibit 19: Order Granting a Hearing on Petitioner's Motion to Vacate the Judgment of Conviction Pursuant to C.P.L. § 440.10, dated June 10, 2004.
- Exhibit 20: Transcript of hearing in the Supreme Court of the State of New York, New York County, regarding Petitioner's Motion Pursuant to C.P.L. § 440.10, on January 18, 2005; May 24, 2005; October 12, 2005; October 17, 2005; and October 27, 2005.
- Exhibit 21: Order of the Supreme Court of the State of New York, New York County, Denying Petitioner's Motion to Vacate the Judgment of Conviction Pursuant to C.P.L. § 440.10, dated June 14, 2006.
- Exhibit 22: Notice of Motion and Affirmation in Support of Motion for an Order Pursuant to C.P.L. § 450.10 Granting Permission to Appeal from the Order of the Supreme Court of the State of New York, New York County, Denying Petitioner's Motion to Vacate the Judgment of Conviction Pursuant to C.P.L. § 440.10, dated July 14, 2006, and accompanying exhibits.

- Exhibit 23: Certificate Granting Leave to Appeal to the Supreme Court of the State of New York, Appellate Division, First Department, pursuant to C.P.L. § 460.15, dated November 16, 2006, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 24: Notice of Appeal to the Supreme Court of the State of New York, Appellate Division, First Department, dated November 28, 2006, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 25: Brief and Appendix for Defendant-Appellant Pablo Fernandez, submitted to the Supreme Court of the State of New York, Appellate Division, First Department.
- Exhibit 26: Decision of the Supreme Court of the State of New York, Appellate Division, First Department, dated January 15, 2009, Denying Petitioner's Appeal from Denial of His Motion to Vacate the Judgment of Conviction.
- Exhibit 27: Letter from David Samel, Esq., to Hon. Jonathan Lippman, dated February 23, 2009, in Support of Petitioner's Application for Permission to Appeal to the New York Court of Appeals; Letter from David Samel, Esq., to Hon. Victoria A. Graffeo, dated March 25, 2009, in Further Support of Petitioner's Application for Permission to Appeal to the New York Court of Appeals; and Letter from David Samel, Esq., to Hon. Victoria A. Graffeo, dated June 19, 2009, in Further Support of Petitioner's Application for Permission to Appeal to the New York Court of Appeals.
- Exhibit 28: Certificate Denying Leave to Appeal to the New York Court of Appeals, dated June 23, 2009, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 29: Transcript of the February 23, 2010 hearing in the above-captioned action.

- Exhibit 30: Notice of Motion Pursuant to CPL § 440.10 and accompanying Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated March 25, 2010 (the "March 25, 2010 Beha Affirmation"), without accompanying exhibits.<sup>4</sup>
- Exhibit 31: Affidavit of Jesus Canela, dated October 15, 2009, which was attached as Exhibit 15 to the March 25, 2010 Beha Affirmation.
- Exhibit 32: Affidavit of Andrew B. Melnick, dated October 23, 2009, which was attached as Exhibit 16 to the March 25, 2010 Beha Affirmation.
- Exhibit 33: Affidavit of David Samel, dated October 24, 2009, which was attached as Exhibit 17 to the March 25, 2010 Beha Affirmation.
- Exhibit 34: Memorandum of Law in Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated March 25, 2010.
- Exhibit 35: Reply Memorandum of Law in Further Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated April 15, 2010.
- Exhibit 36: Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Reply Memorandum of Law in Further Support of His Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated April 15, 2010, without accompanying exhibits.
- Exhibit 37: Order Granting a Hearing on Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to C.P.L. § 440.10, dated June 18, 2010.
- Exhibit 38: Notice of Motion for *In Camera* Review and Disclosure Pursuant to Civil Rights Law § 50-a and for the Issuance of a Subpoena Duces Tecum, dated September 24, 2010, with exhibit, in *People v. Fernandez*, Ind. No. 5415-95.

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<sup>4</sup> To avoid submitting to the Court multiple copies of the same document as part of the voluminous record in this case, many of the declarations filed in the state court are being attached hereto without accompanying exhibits. The omitted accompanying exhibits are, however, otherwise generally attached to this declaration. They also can be provided at the Court's request.

- Exhibit 39: Memorandum of Law in Support of Defendant Pablo Fernandez's Motion for *In Camera* Review and Disclosure Pursuant to Civil Rights Law § 50-a and for the Issuance of a Subpoena Duces Tecum, dated September 24, 2010.
- Exhibit 40: Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Motion for *In Camera* Review and Disclosure Pursuant to Civil Rights Law § 50-a and for the Issuance of a Subpoena Duces Tecum, dated September 23, 2010, without accompanying exhibits.
- Exhibit 41: Reply Memorandum of Law in Further Support of Defendant Pablo Fernandez's Motion for *In Camera* Review and Disclosure Pursuant to Civil Rights Law § 50-a and for the Issuance of a *Subpoena Duces Tecum*, dated October 22, 2010.
- Exhibit 42: Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Disclosure Motion, dated October 22, 2010, without accompanying exhibits.
- Exhibit 43: Order Granting in Part and Denying in Part Defendant Pablo Fernandez's Motion for *In Camera* Review and Disclosure Pursuant to Civil Rights Law § 50-a and for Issuance of a Subpoena Duces Tecum, dated December 6, 2010.
- Exhibit 44: Transcript of hearing in the Supreme Court of the State of New York, New York County, regarding Petitioner's Motion Pursuant to CPL § 440.10, on December 6, 2010 and December 20, 2010.
- Exhibit 45: Subpoena Duces Tecum, directed to the New York Police Department, dated June 29, 2011.
- Exhibit 46: Fax transmission from John-Paul Mayer, Esq. for Hon. Bruce Allen to James J. Beha, II, Esq., dated November 15, 2011.
- Exhibit 47: Defendant Pablo Fernandez's Supplemental Memorandum of Law in Further Support of His Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated December 19, 2011.

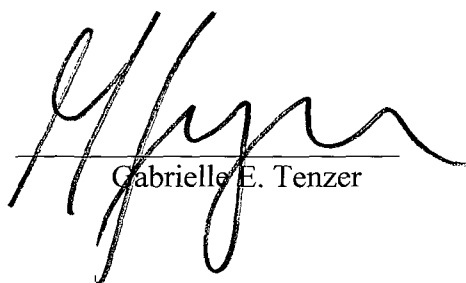
- Exhibit 48: Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated December 19, 2011, without accompanying exhibits.<sup>5</sup>
- Exhibit 49: Post-Hearing Memorandum in Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated February 4, 2011.
- Exhibit 50: Affirmation of James J. Beha II, in Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated February 4, 2011, with certain accompanying exhibits.
- Exhibit 51: Post-Hearing Reply Memorandum in Further Support of Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated July 15, 2011.
- Exhibit 52: Order of the Supreme Court of the State of New York, New York County, Denying Defendant Pablo Fernandez's Motion to Vacate the Judgment Pursuant to CPL § 440.10, dated March 1, 2013 and rendered March 5, 2013, a certified copy of which was mailed to counsel for Mr. Fernandez on or around March 29, 2013, and received on or around April 3, 2013.
- Exhibit 53: Notice of Motion for Certificate of Leave to Appeal and accompanying Affirmation of Katharine E.G. Brooker in Support of Motion for Certificate Granting Leave to Appeal, dated April 8, 2013, without accompanying exhibits, in *People v. Fernandez*, Ind. No. 5415-95.
- Exhibit 54: Memorandum of Law in Support of Defendant-Appellant Pablo Fernandez's Motion for Certificate Granting Leave to Appeal, dated April 8, 2013.
- Exhibit 55: Reply Memorandum of Law in Further Support of Defendant-Appellant Pablo Fernandez's Motion for Certificate Granting Leave to Appeal, dated April 23, 2013.
- Exhibit 56: Certificate Denying Leave to Appeal, dated May 30, 2013, and entered July 16, 2013 by the Supreme Court of the State of New York, Appellate Division, First Department.

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<sup>5</sup> Although this document is dated December 19, 2010, the date was in error. The document was submitted on December 19, 2011, and should bear that date.

4. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 16, 2013.



Gabrielle E. Tenzer